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REPORT TO THE GOVERNOR

Commission on Civil Service Reform

DRAFT – September 19, 2003

BACKGROUND

Colorado's state civil service system was established as part of the State Constitution in 1918, in a time long before comprehensive federal laws such as the Fair Labor Standards Act, the Hatch Act, the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and their counterparts in state law. While the world has changed substantially since 1918, the Colorado civil service system has not.

Our first state civil service system was created by statute in 1907.[1] Under that system, the Governor appointed a volunteer three-person Civil Service Commission, which made and enforced rules regarding classification, selection, compensation, and discipline for what was then a small workforce – in 1916, the State employed only 916 classified employees.[2] Another 1,237 employees were either "unclassified" or exempt, of whom 102 were employed by the legislative branch, 184 by the judicial branch, and 517 by educational institutions.[3] The single largest employer was the University of Colorado with 228 (34 classified, 194 other), followed by the State Hospital with 154 (135 classified, 24 other), the State Agricultural College (now Colorado State University) with 146 (23 classified, 123

[1] Colo. Rev. Stat. ch. 26 (1908).
[2] Biennial Report of the Civil Service Commissioners (1916), pp. 20-24.
[3] These figures include all elected and appointed officials, such as legislators and judges.

other). After these major state institutions, the next largest employer was the Board of Stock Inspection Commissioners, with 140 (131 classified, 9 other). By comparison, the State Penitentiary only had 59 staff (57 classified, two other).

In 1918, William W. Grant, Jr. and Henry van Kleeck of the Denver Civil Service Reform Association authored a detailed constitutional Civil Service Amendment, which was then placed on the ballot by citizen initiative. The petition drive characterized the issue as "merit system vs. spoils system;" specifically that appointments should be made on the basis of "fitness" and that employees should enjoy "permanency of employment" during "efficient" service.[4] Although there is little information compiled regarding the election campaign, newspaper reports noted that the statutory system had been called a "bogus civil service measure" because every new Governor could appoint an all–new Civil Service Commission.[5] The constitutional amendment was urged because it would "place the Colorado state government on a business-like basis by applying the merit system to appointments in the civil service of the state."[6]

The constitutional civil service system was adopted by a vote of 75,301 to 41,287 (64.6% to 35.4%). Its major provisions included:

- A civil service system covering all positions except the General Assembly, the Judiciary, elected officials and their immediate staffs, teachers, attorneys, the Public Utilities Commission, and the Civil Service Commission;

[4] Petition, "Civil Service Amendment to the Constitution" (1918).
[5] "New Measures Placed on Ballot for Voters to Pass on Tuesday," Rocky Mountain News (Nov. 3, 1918).
[6] "Merit Basis Seen As Cure For State Business Laxity," Denver Post (Nov. 5, 1918).

- Employment in the civil service system based upon merit and fitness;
- The person scoring highest on a competitive test is appointed;
- All persons appointed must be eligible to vote;
- Employees hold positions during efficient service;
- Three-person Civil Service Commission, all appointed by the Governor to staggered six-years terms, adopts all rules, administers test, hears cases, and establishes job classes;
- Employees entitled to disciplinary hearings before the Commission; and
- All current state employees immediately brought into new system.

In 1939, Governor Ralph Carr commissioned an independent study by a consulting firm to evaluate the organization and efficiency of Colorado state government. That report noted that there were 48 independent and semi-independent state officers and agencies, and found that "most of them do about as they please and some of them even go so far as to disregard the authority of the governor as executive head of the department."[7] The General Assembly subsequently passed the State Reorganization Act, which was the first broad effort to improve the efficiency of state government.[8]

[7] Griffenhagen & Associates, *Report on the Administrative Organization and Functions of the State Government of Colorado* (Jan. 1939), *quoted in* Legislative Council of the Colorado General Assembly, *Reorganizing the Executive Branch of Colorado State Government*, Research Pub. No. 131 (Dec. 1967) at viii.

[8] Carr is perhaps best known for his efforts during World War II to combat discrimination and the federal government's efforts to imprison and persecute Japanese-Americans, thereby sacrificing his political career. *See* Richard D. Lamm and Duane A. Smith, "Pioneers and Politicians: Ten Colorado Governors in Profile" (1984).

The 1918 amendment remained unchanged until 1944 when, in the latter stages of World War II, Colorado voters added a veteran's preference to the Civil Service Amendment. The preference, which also extended to counties and municipalities, was provided to combat veterans, widows of veterans, and disabled veterans of the Spanish-American War, the "Philippine Insurrection,"[9] World War I, and World War II.

In 1956, Governor Edwin C. Johnson supported a constitutional amendment to, among other things:

- Exempt six "confidential employees" of the Governor's Office, teachers and officers of educational institutions and, if the General Assembly statutorily authorizes it, the State Controller and the heads of the Departments of Revenue, Institutions, and Purchasing;
- Eliminate the examination requirement for promotions;
- Require a six month probationary period;
- Eliminate the requirement that employees be eligible to vote; and
- Make some changes to how Civil Service Commissioners were appointed, their terms of office, made and enforced their rules.

It was defeated by a vote of 32% to 68%, apparently based upon concerns that the changes would weaken the strength and independence of the Civil Service Commission.[10]

[9] During the Spanish-American War, an insurgent army of native Filipinos secured control of several islands. Over 120,000 American soldiers put down the rebellion after four years of guerilla war.

[10] Legislative Council of the Colorado General Assembly, An Analysis of Ballot Proposals, Research Pub. No. 18 (1956); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to*

The following year, the new Governor, Stephen L.R. McNichols, commissioned an independent study to examine the civil service system in detail. That study concluded that, among other things, the "rule of one" needed to be expanded, a probationary period was needed, that open-ended temporary appointments (called "provisional appointments" needed to be limited, and exemptions needed to be expanded.[11]

Based upon the study's findings, Governor McNichols advocated changes to the Civil Service Amendment on the ballot in 1958 and 1960. The 1958 measure would have, in part:

- Eliminated the "rule of one" and permit the number to be determined by statute;
- Limited provisional appointments (filling a permanent position with a temporary employee while an eligible list is appointment being obtained) to eight months;
- Grandfathered in as permanent employees all temporary employees who had served at least two years;
- Eliminated the requirement that employees be eligible to vote;
- Create the position of state personnel director, to be appointed by the Civil Service Commission;

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the Colorado Constitution, 1946-1976, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

[11] Louis J. Kroeger and Associates, *"Colorado's State Personnel Program: A Preliminary Report to Stephen L.R. McNichols, Governor of Colorado"* (Dec. 1957), at 67-68.

- Expanded exemptions to include employees of the Department of Education, the State Historical Society, faculty at state institutions; the Governor's secretary, administrative staff, and four "confidential employees", and nine department heads, as provided by law;
- Required the General Assembly to establish pay ranges based upon prevailing compensation in other public and private employment;
- Limited the veteran's preference in promotions; and
- Allowed the Governor to veto rules adopted by the Civil Service Commission.

This proposal was narrowly defeated by a vote of 49% to 51%, primarily on the argument that overall these reforms would give too much authority to the Governor.[12] Undaunted, Governor McNichols returned in 1960 with a modified proposal to:

- Eliminate the "rule of one" and permit the Civil Service Commission to determine the number;
- Require a twelve-month probationary period;
- Eliminate the examination requirement for promotions;
- Eliminate the requirement that employees be eligible to vote;
- Expand exemptions to include the State Land Board, administrative staff in the Governor's Office, one secretary for each elected official, and part-time employees;

[12] Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 23 (1958); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

- Eliminate exemptions for teachers at state schools outside of higher education, such as the School for the Deaf and the Blind; and
- Make changes to how Civil Service Commissioners were appointed, their terms of office, made and enforced their rules, similar to those proposed in 1956.

The proposal was rejected by the voters, 39% to 61%, with the opponents arguing that it sought to change things that did not need to be changed, while leaving undisturbed things that did need revision.[13]

Although proposed amendments had been defeated in three successive elections, the stage had been set. In 1962, the Legislative Committee on Organization of State Government began an extended study of the organization of the executive branch, including the state civil service system, which led to a 1966 ballot measure. The referendum required the reorganization of 130 state offices and agencies into no more than 20 cabinet departments, in part because no governor "can reasonably be expected to provide effective leadership and supervision over the development and administration of these various programs."[14] The voters overwhelmingly approved the new § 22 of Article IV of the Constitution by a 70% to 30% margin.[15]

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[13] Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 37 (1960); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

[14] Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 110 (1966).

[15] R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

Two years later, the General Assembly passed, and Governor John A. Love signed, the Administrative Organization Act of 1968,[16] the first comprehensive reorganization since Governor Carr's groundbreaking initiatives in the early 1940's. This law, which created 17 departments, established the essential departmental structure still followed by Colorado government to this day. The Legislative Committee also began preparing a proposed constitutional amendment regarding the state civil service. The following year, Governor Love appointed a group of business leaders as a Committee on Efficiency and Economy, to study and recommend improvements to the operation of state government. The results of this Committee's work were incorporated into the draft, which the General Assembly then referred to the voters at the 1970 general election.

The 1970 changes appeared in the form of two separate amendments: a narrower one to exempt all department heads – allowing the Governor, for the first time, to select his own cabinet – and a broader one, to:

- Replace the "rule of one" with a "rule of three";
- Replace the three-member Civil Service Commission with a five-member State Personnel Board to regulate and conduct hearings and a State Personnel Director appointed by the Governor to administer the system;
- Require a twelve-month probationary period;
- Limit temporary appointments to six months;
- Replace the requirement that employees be eligible to vote with a residency requirement;

[16] Colo. Sess. L. 1968, ch. 53.

- Establish division directors as the appointing authorities for employees within their divisions;
- Exempt the members of the State Parole Board and the Board of Assessment Appeals; and
- Extend the veteran's preference to persons serving in Korea and Vietnam, eliminate the preference in promotional examinations, but add a preference in layoffs.

The first proposal passed by a vote of 57% to 43%, while the second passed by a margin of 66% to 34%.[17]

At the time, almost all of the non-professional work force of the public institutions of higher education was within the state civil service, with the notable exception of the University of Colorado. In November 1972, the voters approved an amendment to Article VIII, § 5 of the Colorado Constitution. In two ways, the amendment placed all state higher education institutions on a more equal footing, eliminating the unique constitutional status the Board of Regents had enjoyed since 1876. First, the other major state educational institutions were elevated to constitutional status, granting powers of general supervision and control of funds. Second, the General Assembly was vested with broad power to establish the parameters within which the governing boards may operate.

Soon thereafter, officials of the University of Colorado asked Attorney General John Porfilio Moore[18] for guidance regarding the effect of this change

[17] Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 151 (1970); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

upon their employees. The Attorney General determined that the constitutional amendment caused the Regents to be subject to the same higher education laws as other governing boards,[19] and that a pre-existing statute which included all other non-professional higher education employees in the civil service[20] now applied to the University of Colorado.[21] Based upon this, the University of Colorado began transitioning its non-professional staff into the state civil service.

In 1976, a measure was referred to the ballot to exempt the personal secretary to the Executive Director of each principal department and to allow the General Assembly to exempt by law the heads of state agencies from the personnel system. The proponents argued that the change would make government – especially the Governor – more accountable and responsive to the public. The opponents argued that, even though only about 100 positions would be affected, it would create a "spoils system," and the measure was defeated by a vote of 24% to 76%.

In 1983, Governor Richard D. Lamm appointed a task force to examine the problem of "the dual personnel system (e.g., classified and non-classified) in the institutions of higher education," and "to develop some solutions that meet the many concerns of all those in the higher education community." The group reported back that constitutional change was needed as well as the following statutory changes:

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[18] Now Senior Judge, U.S. Court of Appeals for the Tenth Circuit.
[19] Colo. A.G. Op. No. 73-0014 (Apr. 2, 1973).
[20] Section 26-1-1(1), C.R.S. (1963), now § 24-50-101(1), C.R.S.
[21] Colo. A.G. Op. No. 73-0042 (Dec. 12, 1973)

- Fully fund the annual salary survey, along with allowing geographic pay differentials;
- Authorize governing boards to establish salaries for classified employees;
- Authorize institutions to furlough classified staff and contract out for certain services; and
- Allow governing boards to define exempt positions.[22]

That same year, the General Assembly tasked Assistant Attorney General William Levis with examining the merits system in Colorado and other States, and to propose changes.[23] Levis' report, which provided an extensive menu of possible constitutional amendments ranging from modest updating to wholesale elimination of all but the merit principle itself, is possibly the most extensive and thorough treatment of the topic to date.

In 1986, the General Assembly referred a potentially far-reaching measure to the voters. Among other things, it would have: abolished the State Personnel Board; empowered the State Personnel Director to make all rules regarding the system; allowed the General Assembly to provides exemptions by statute; repealed the residency requirement; and extend temporary appointments to 12 months. The supporters urged that the resulting system would be more efficient, more adaptable to changing conditions, and would result in a more accountable state government. The opponents charged that the changes would eliminate too much protection for employees and could end up making the system too political. The proposal was

[22] Colorado Legislative Council, Committee on the Personnel System, *Recommendations for 1984*, Research Pub. No. 283 (Dec. 1983) at 60.
[23] Levis, *Report to the Colorado General Assembly: Modernizing the Colorado Personnel System* (Jan. 1984).

supported by all three living former governors (McNichols, Love, Vanderhoof), the current governor (Lamm), and the two candidates for governor (State Treasurer Roy Romer and State Senate President Ted Strickland), but employee organizations and the State Personnel Board were divided. After a close campaign which saw the amendment leading in the polls until the closing weeks, the measure was narrowly defeated by a vote of 49% to 51%.

Two years later, Governor Roy Romer established a Commission on Privatization to establish criteria for the evaluation of potential outsourcing of government services and formulating policy guidelines for evaluating privatization proposals.[24] Based upon that Commission's recommendations, Governor Romer issued a follow-up order the next year directing his cabinet to review their services to determine suitability for privatization. He determined that the following types of services were appropriate to privatize:

- Services which were new or lacked a long traditon of public provision;
- Seasonal or sporadic services
- Services that are essentially commercial and for which there are readily available private providers; and
- Situations or geographic areas where significant cost savings or enhanced efficiencies can be achieved through contracting.

At the same time, Governor Romer also determined that the following types of services were not appropriate to privatize:

[24] Executive Order No. B-018-88 (Feb. 5, 1988).

- Core functions of government;
- Services which are not readily available from the private sector;
- Services which cannot be efficiently measured as to cost, quality, process, and outcomes;
- Services for which there are legal barriers to privatization; and
- Services whose privatization would adversely affect current state employees, unless the effects can be mitigated.[25]

In 1989, the General Assembly provided for the reorganization of the University of Colorado Hospital into a private nonprofit corporation and required current employees to give up their civil service rights.[26] In 1990, the Supreme Court declared the law to be an unconstitutional attempt to circumvent the merit system.[27] The following year the General Assembly revised the law, adding a provision that gave current employees the option of remaining state employees or becoming corporate employees.[28]

In 1991, the Colorado Supreme Court declared that attempts to outsource services commonly or historically provided by classified employees were impermissible.[29] The following year, a Department of Personnel task force issued a report and made recommendations for how to proceed with essential government functions in light of court decisions invalidating the contracting statutes and

[25] Executive Order No. D-109-89 (Feb. 24, 1989).
[26] Formerly §§ 23-21-401, *et seq.*, C.R.S., since repealed.
[27] *Colorado Ass'n of Public Employees v. Board of Regents*, 804 P.2d 138 (1990).
[28] *See* § 23-21-501, C.R.S.
[29] *Colorado Ass'n of Public Employees v. Department of Highways*, 809 P.2d 988 (Colo. 1991).

procedures. In 1993, the Supreme Court invalidated an attempt by the General Assembly to outsource custodial services which displaced certified employees.[30]

Also in 1993, the General Assembly passed House Bill 93-1212, which established a comprehensive legal structure to validate the lion's share of contracting then being done by the State.[31] In 1996, the General Assembly established a privatization commission to study and make recommendations concerning privatization of services performed by classified employees.[32] After extensive study, that commission made several recommendations:

- Create a permanent Commission on Government Efficiency to determine privatization feasibility on an ongoing basis;
- Institute a reliable and complete cost accounting function throughout state government;
- Initiate competitive market testing;
- Permit state agencies to prepare work proposals and submit bids to compete with private bidders (managed competition);
- Increase the use of performance-based contracting and effective monitoring of contractor performance; and
- Create labor-management cooperation councils to advise state agencies regarding managed competition and privatization.[33]

[30] *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993).
[31] This law was modified slightly in 1995. *See* Colo. Sess. L. 52.
[32] House Bill 96-1262.
[33] Commission on Privatization, *More Competitive Government: A Report to the General Assembly* (Dec. 1997).

In 1997, the State Auditor conducted a performance audit of the system and recommended, among other things, that the "rule of three" be expanded, and temporary appointments be extended beyond six months. The Department of Personnel agreed and further suggested moving the bulk of the current Civil Service Amendment out of the Constitution and into statute. [34] The Attorney General followed up with an extensive analysis and endorsement of the lion's share of the State Auditor's recommendations.[35]

In 2002, the Legislative Audit Committee issued a critical report on the process for determining the appropriateness of exempting positions from the civil service system at institutions of higher education. Citing the inefficiency of the current process, the report directed the Department of Personnel & Administration and the Department of Higher Education to, among other things, "evaluate the current higher education personnel system, as well as alternatives to this system, to determine which would best meet the needs of higher education and the State as a whole, and seek statutory and constitutional changes as needed."[36]

Today, the state civil service encompasses over 31,000 employees, of whom roughly 69% are in general government agencies, with the remaining 31% employed by institutions of higher education. The 3000 people employed by the Department of Transportation, and the 5500 employed by the Department of Corrections, utterly dwarf the payroll of the old Board of Stock Inspection

[34] *Report of the State Auditor: Department of Personnel Performance Audit* (Nov. 1997), at 43-59.
[35] Letter of Attorney General Gale A. Norton to Senator Tillman Bishop (Feb. 2, 1998).
[36] *Report of the State Auditor: Higher Education Personnel Exemption Process* (Sept. 2002), at 28.

Commissioners. In addition, the range of duties performed by state employees have outstripped what could have been imagined by those adopting the 1918 amendment: typing pools and a Commissioner of Public Printing have given way to information technology experts and a vast array of human services professionals.

THE REFORM PROCESS

On March 12, 2003, Governor Owens issued Executive Order B 003 03, establishing the Commission on Civil Service Reform. The Governor noted that Colorado's civil service system is the most constitutionally rigid in the United States. Although a number of the protections provided in Colorado are comparable to those found in state personnel systems throughout the country, the distinguishing feature of Colorado's system is that unlike every other State – with the possible exception of Louisiana – not only its substance but much of its *process* is embedded in the Constitution. The result is a rigid employment system that causes waste and inefficiency, and hinders the effectiveness of the state workforce.

The Governor was concerned that despite some important strengths – most notably the "merit principle" – Colorado's civil service system has failed to keep pace with changing legal and economic circumstances. This static employment system has prevented Colorado state government from modernizing its processes in ways currently enjoyed by almost every other State. For example, Colorado's Constitution is the only one that restricts state managers to considering only the top three candidates for a position, rather than all qualified applicants. Only three other state legislatures are not allowed to determine what positions should be covered by the civil service. Over two-thirds of all States do not even mention the civil service in their constitutions.

The Executive Order directed the Commission to report back to the Governor and "recommend reforms to better serve the needs of state government, public employees, and taxpayers." While the Commission focused primarily upon

constitutional changes, a number of statutory fixes were also considered when it appeared that doing so would eliminate the need for further constitutional modifications.

Any change to the Constitution requires an amendment to be adopted by the voters at a general election. A proposed amendment can be placed before the voters in only one of two ways: either a referendum, or an initiative. A referendum requires the support of two-thirds of each house of the General Assembly, but unlike a statute is not subject to the signature or veto of the Governor. The two-thirds requirement necessarily demands that a proposed referendum have broad, bipartisan support. An initiative requires a petition drive to obtain the signatures of 5% of the votes cast at the 2002 general election.[37] The difficulty and expense of securing these signatures makes the initiative the disfavored avenue to the ballot for the Commission's recommendations.

The Commission began its work by identifying three major areas for study and consideration: general system reform, contracting, and higher education, and created three committees or "working groups" to make initial proposals. In addition, it met on April 15, May 15, June 26, and August 28 to hear testimony from a number of persons having extensive expertise or experience with the state personnel system, including Gail Schoettler (former State Personnel Director and former Lt. Governor), Wendell Pryor (director, Colorado Civil Rights Division, and former executive director, Colorado Association of Public Employees), Jerry Marroney (State Court Administrator), Jo Romero (Colorado Federation of Public Employees), Forrest Cason (Senior Vice President & CFO, University of Colorado

[37] Colo. Const. art. V, § 1(2).

Hospital), Vonda Hall and Bill Hanna (Colorado Association of Public Employees), and former State Representative Penn Pfiffner. The Commission also discussed the progress of the working groups, and heard from those members and staff who had participated in public meetings held throughout the State with interested employees.

Commissioners and staff held sessions in Fort Collins, Canon City, Pueblo, La Junta, Boulder, Denver (Auraria campus), Sterling, Denver (State Capitol), Gunnison, Durango, Alamosa, Colorado Springs, Greeley, Glenwood Springs, Grand Junction, and Rifle. All told, over 3,000 state employees participated in these meetings, and dozens more communicated with the Commission via its web site. Articles also appeared in each issue of *Stateline* (the state employee newspaper) describing the Commission's activities and some of the feedback it was receiving from state employees. In addition, commissioners and staff participated in a workshop with the Colorado chapter of College and University Professional Administrators – Human Resources, which is part of a nationwide network of public and private personnel professionals from institutions of higher education.

Testimony varied widely depending upon the issue, the location, and, to some extent, whether higher education employees predominated and the point in the process when meeting was held. Earlier on, when the Commission had no concepts to which employees could react, comments tended to be broad, general, and more often than not touching upon salaries, performance pay, and benefits. Later, after the working groups made their reports, responses were more thoughtful, focused, and constructive. More than one employee urged the

Commission not to "propose change for change's sake." This was taken to heart and is reflected in the Commission's efforts to focus upon those aspects of the system that most employees or administrators thought warranted attention.

At the same time, it should be noted that the employment relationship between an individual and the State entails a wide range of issues, including selection, compensation, leave practices, retention, discipline, and retirement, among others. The Commission focused upon structural rather than financial issues in its work, and therefore has not considered any changes to the state employee compensation system or the Public Employees' Retirement Association (PERA) eligibility or benefits.

On June 1, the working groups published their reports and initial proposals. The Commission took these under advisement and continued the process of reaching out to state employees and soliciting input. Some proposals were eventually dropped, and some additional new ones were added, as a result of this continued outreach and feedback from employees.

RECOMMENDATIONS

The Commission examined each of the following major components of the civil service system: the merit principle, the relative roles of the State Personnel Board and the State Personnel Director, selection and the "Rule of Three," residency requirements, positions exempt from the system, temporary appointments, probationary periods, contracting, discipline, veteran's preference, and the unique issues surrounding personnel human resource at institutions of higher education.

Merit principle. The merit principle as set forth in Article XII, § 13(1) is the cornerstone of an effective civil service system: "Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, … without regard to race, creed, or color, or political affiliation." As the Colorado Supreme Court has said, "The overarching purpose of the state personnel system is to assure that a well-qualified work force is serving the residents of Colorado." Department of Human Services v. May, 1 P.3d 159, 166 (2000). We recommend that this fundamental principle remain undisturbed in our Constitution, except for the addition of "sex" to the list of impermissible bases for appointments and promotions. The requirement of competitive testing should also be eliminated to provide additional flexibility in the determination of qualifications, and further specific facets of the merit principle should be more fully set out in statute.

The State Personnel Board and the State Personnel Director. The civil service system is governed by a patchwork of constitutional provisions, statutes,

Board rules, and Director's procedures, as interpreted by court rulings. Much of this flows from the structure of the 1970 amendment, which created both the Board and the Director.[38]

It makes sense for an executive branch official to oversee the selection system, classification, and compensation, given the extensive staffing and expertise required to discharge these responsibilities. However, the Commission does not believe there must be a constitutionally-mandated Personnel Department in order to carry out these responsibilities, and would recommend that this specific requirement be eliminated from the Constitution. At the same time, we would propose the Constitution specify that the Personnel Director have rulemaking authority with respect to those aspects of the system for which he or she is responsible.[39]

The Commission recognizes the critical role of the Board, which serves as an objective arbiter of employment disputes as well as an independent check on potential executive branch abuses. It is essential that the Board and its rulemaking authority be retained, but its role needs to be more clearly focused. We propose a statutory adjustment so that the Board will continue hearing appeals relating to disciplinary matters and separations, but not hear other matters arising out of the

[38] *See, e.g. Department of Personnel v. State Personnel Board*, 722 P.2d 1012, 1019 (Colo. 1986)("the board and the department are distinct entities with separate powers and responsibilities.")(quoting *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350, 1355 (Colo. 1984)).

[39] This ambiguity was soon recognized. "[P]roblems have developed with the implementation of the 1970 amendment. Conflict exists between the personnel board and the personnel director over their division of responsibilities." Colorado Legislative Council, Committee on the Personnel System, *Recommendations for 1984*, Research Pub. No. 283 (Dec. 1983) at 60.

grievance process, which are better resolved at the agency level between the supervisor and employee.

Discrimination claims present a more difficult issue, because there are extensive investigatory and review processes provided by state (Colorado Civil Rights Division) and federal (Equal Employment Opportunity Commission and the U.S. Department of Justice) agencies. The Board refers all claims of violation of the Colorado Anti-Discrimination Act to the CCRD, which conducts an investigation and sends a report back to the Board. The investigations may take as long as 450 days, almost never find probable cause to believe the action was discriminatory, the reports are not binding on the Board, and the administrative law judges do not consider those reports because their findings have to be based upon the evidence, not upon reports from outside investigators. These investigations also cause a drain on CCRD resources, for which the CCRD is not compensated by the EEOC. This process contradicts the overall mission of the Board, which is to provide a quick and inexpensive forum for resolving employment disputes, and the Commission recommends statutorily eliminating it.

Similarly, the Board refers "whistleblower" retaliation claims to the Department of Personnel & Administration, which conducts an investigation and sends a report back to the Board. Again, those reports rarely result in findings of retaliation, they create a delay in the hearing process, the reports are not binding on the Board, and the administrative law judges do not consider the reports.

It would be more efficient, and more consistent with the Board's mission, to have discrimination and whistleblower claims be resolved directly through the

Board's processes without going through an intermediate time-consuming stage with either CCRD or DPA, which adds little or no value to the ultimate determination. We recommend the statutes be amended so that the Board is vested with sole jurisdiction over employees' state civil rights claims, while ensuring that employees' federal civil rights claims continue to be reviewed by the EEOC. The Board should retain jurisdiction to grant discretionary hearings for grievances that allege discrimination, retaliation, or other constitutional or statutory violations.

Selection and the "Rule of Three." Colorado's current selection system demands not only that candidates be qualified, but also that there be a competition and a resulting ranking of the candidates, with only those ranked in the top three being eligible for appointment. Only ten States constitutionally require a competitive selection process, and of those only Colorado and Louisiana limit appointments to the top three candidates.[40] This system requires the State to expend considerable resources developing, validating, and administering examinations to create ranked eligible lists, while creating extensive delays of weeks or even months in filling vacancies.

At the same time, competitive examinations put a premium upon test-taking skills, and discount judgment, demeanor, and other factors that are difficult to assess through a written instrument.[41] It does not ensure that the best qualified applicant for a position can even be considered for appointment. In this way, a

[40] *See* Appendix ___.

[41] Merit "has been broadened to mean more than ranking candidates according to measures of their ability." Nigro and Nigro, *The New Public Personnel Administration*. (1981). Other predictors of occupational performance such as biodata, work-related personality measures, structured interview practices are important. Hunter and Hunter, "Validity and Utility of Alternative Predictors of Job Performance," *Psychological Bulletin*, v. 122, pp. 72-98 (1996).

competitive selection process may actually work at cross-purposes with the merit principle. The Commission also heard some testimony that on occasion a quality temporary employee would learn a job, fit in well with co-workers, and show great promise, but there was no means to transition the employee into the permanent system without announcing a vacancy and going through the laborious process of competitive testing. A system which thus hinders the appointment of qualified and proven candidates must be revised.

The Commission recommends allowing the interview and appointment of any applicant who is qualified for the position. Qualifications may be determined by a written examination, oral board, search committee, or other valid process, but the Commission recommends eliminating the current constitutional demand that qualifications "be determined by competitive tests of competence."

Probationary periods. Colorado is the only State that specifies the probationary period in its Constitution, and this unnecessarily eliminates the flexibility of the General Assembly to make adjustments in the future. We recommend retaining the current 12-month probationary period, but moving it into statute.

Residency. The initial report of the Commission's working group recommended retaining the current residency restriction, which requires all state employees to reside in Colorado, and further requires all applicants to reside in the State unless the State Personnel Board grants a waiver. However, since that time the Commission has heard additional testimony which highlights both the undesirability and unworkability of the current residency restriction.

The Commission heard about specific types of positions that are difficult to recruit, for which the residency restriction only aggravates the problem. We heard that with the shortage of qualified nursing staff, the Mental Health Institute in Pueblo has an extremely difficult time securing well-qualified applicant pools.[42] At Alamosa, the Commission heard that recruitment for several of the skilled trades are hindered by the residency restriction.[43] In Glenwood Springs, the Commission was told that the limitation made it difficult to hire capable young engineers. Although not as pronounced in other areas, the Commission also heard testimony that state offices near Sterling and Greeley experience difficulty recruiting because of the residency restriction.

While the State Personnel Board can waive the residency requirement as to *applications*, there is no ability to waive residency for persons actually *appointed* to state positions. In the Durango area, recruitment for most mid- to low-paying positions is hindered by the high cost of living in La Plata County. Qualified candidates from San Juan County, New Mexico – less than 20 miles away from Durango – will not apply because they cannot afford to move across the state line to take the job. Some 2,300 people – over 10% of the total workforce of La Plata County – travel from outside the county.[44]

[42] Testimony of Lee Ann Gilbert, Director of Nursing, Colorado Mental Health Institute at Pueblo (June , 2003).
[43] Testimony of Bill Mansheim, Vice President for Finance and Administration, Adams State College (June 3, 2003).
[44] Region 9 Economic Development District of Southwest Colorado, *Report: Demographics and Economics* (May 2002).

For some time there have been state employees residing outside Colorado, notwithstanding the restriction, the most obvious example being the entire class series devoted to "Out of State Revenue Agents." These individuals perform field audits of large, multi-state or international corporations doing business in Colorado, conducting audits at the organization's location of financial records and company reports used to prepare tax returns and other reports. Over the years these employees have been posted to locations such as New York/New Jersey, Chicago, Dallas, and San Francisco. In addition, the Center for Environmental Management of Military Lands at Colorado State University employs about 180 staff in Colorado and across the country.[45] Currently, the Center has fewer than a dozen classified employees living and working in places such as New York, Michigan, Florida, Louisiana, Washington, Alaska, and Hawaii.[46]

Importantly, eliminating the residency requirement would not have an adverse affect on state revenues, as the law currently provides that an individual must pay Colorado tax on income earned here, regardless of whether the individual actually lives in the State.[47] A constitutional residency restriction ignores the realities of our national economy, and is inconsistent with the constitutional purpose of the civil service system, "to assure that a well-qualified work force is serving the residents of Colorado." The Commission recommends eliminating the requirement that applicants be residents, and moving the requirement that appointees be residents into statute, so that the General Assembly can provide

[45] The Center is a team of environmental professionals which provides expertise in land management and ecosystem science as they apply to military testing and training lands.
[46] A handful of Department of Corrections employees live in Nebraska and New Mexico, and the Department of Agriculture employs one Wyoming resident.
[47] *See* § 13-22-109, C.R.S. In fact, the law requires tax to be paid on income from Colorado sources, even if the individual is never physically within the State.

limited exceptions for revenue agents, and higher education programs, if it wishes to do so.

Positions exempt from the system. The discussion of the number and types of positions to be exempted from the civil service is bound up with two competing interests: the merit principle and the effectiveness of representative government. The State needs to protect its permanent professional work force, while at the same time ensuring that its work force is responsive in implementing the policies determined by the citizens' elected representatives. Therefore, the question is not whether to have exemptions, but rather what types of exemptions strike the best balance between these two important principles.

The Commission does not believe it is necessary to dramatically expand the exemptions that are currently available, nor to expand gubernatorial appointments.[48] We do believe that department heads need to be able to appoint their immediate staffs in positions where loyalty and confidentiality are particularly key, such as deputy department heads, chief financial officers, public information officers, human resource directors, and executive assistants.[49]

The working group report had initially proposed exempting division directors, based upon the extensive review and recommendations made by consultants, task forces, and legislative committees going back to the late 1930's. However, since the publication of the working group report, the Commission has

[48] Only four States even specify the exemptions in their respective Constitutions: Colorado, Louisiana, California, and Michigan.

[49] The Commission recommends that this change be effective with the next administration, on January 1, 2007, while all other changes should be effective July 1, 2005.

received substantial testimony from both employees and managers expressing concern over the continuity and expertise that might be lost if senior management positions became at-will. Although this does not diminish the need for a greater degree of responsiveness and accountability from those senior managers formulating and carrying out executive policy, we believe those goals can be achieved and employees' concerns met through a more flexible senior executive service system.[50] Therefore, we recommend providing constitutional recognition and exemption of the senior executive service so that it can be adapted as necessary to meet the demands of the State's business.[51]

Temporary appointments. Only three States constitutionally specify the duration of temporary appointments. In Colorado, temporary employees need not demonstrate particular qualifications but are limited to six months, which is a somewhat crude way of protecting the merit principle. There appears to be general consensus that six months is too short in many circumstances, such as when a special project may take a year to complete or when the funding (often federal grant funds) is for a specific one- or two-year period.

[50] Senior executives do not warrant and should not expect the same panoply of protections as line employees not responsible for formulating policy. As Rudy Marquez, a materials tester with the Department of Transportation office in Lamar, told the Commission: "People doing the work need protection – the ones out there getting their hands dirty."

[51] The Commission also recommends changing the constitutional exemption of "members of any board or commission serving without compensation except for per diem allowances provided by law and reimbursement of expenses" to simply "members of any board or commission." This would not increase current exemptions but would permit some cleaning-up of the provision by allowing the elimination of the current list of "members of the public utilities commission, the industrial commission of Colorado, the state board of land commissioners, the Colorado tax commission, the state parole board, and the state personnel board."

The working group proposed extending temporary appointments to a maximum of 24 months, while requiring appointees to be fully qualified. After hearing further testimony and discussing this issue in greater detail, the Commission does not believe this either adequately addresses the need for flexibility that has been demonstrated, nor promotes the merit principle as fully as it could. Similarly, the Commission examined the potential benefits of a system of "term" appointments of one or two years, but some federal grants or other projects may extend more than two years. Thus, the working group proposal (or some variation of it) would reduce, but not eliminate, the problems caused by the current six-month limit, especially in institutions of higher education.

However, upon further research and review, it appears the problem with temporary appointments has less to do with the duration than the consequences of hiring permanent employees for longer-term projects and programs. Under current law, a permanent certified employee has "retention rights" (also known as "bumping rights") whenever his or her position is eliminated for lack of work, lack of funds, or reorganization. These rights entitle the employee to be transferred into other positions for which he or she has experience and is qualified, even if in some cases it means taking the position of another, less senior, employee.[52]

Only the "rule of three" drew more negative comment at the Commission's public hearings than bumping rights. The disruptive effects and adverse impact upon morale were criticized by managers and employees alike.[53] It is not a

[52] For this reason, they are also informally known as "bumping rights," because of the ability of one employee to "bump" another out of his or her job.

[53] A particularly notable example from the Department of Corrections this past year illustrates this point. A General Professional III position in Cañon City was abolished, and the employee

practice that is widely used in either the public or private sector, and it is not required by the Colorado Constitution.[54] Instead, it is established by state statute and Personnel Board rule. The Commission recommends the General Assembly amend § 24-50-124, C.R.S. to eliminate bumping into occupied positions, while retaining it for vacant positions. At the same time, we would support eliminating the current ability of a department (with the approval of the State Personnel Board) to limit bumping to major divisions, rather than department-wide.[55]

Another problem with the current six-month limit that the Commission has identified is that it interferes with the effective use of *seasonal employees*. Seasonal employees are different from temporaries in that their positions are not limited to a relatively short period of time, and the need recurs every year, but always for periods of less than a year. Examples include park officers, of whom over 300 are required each year to police Colorado's state parks, another 300 parks employees providing tourist and visitor services and administrative support, a wide range of over 100 wildlife staff, and supplemental education staff who are needed only during the academic year. Importantly, the public is better served if the State is permitted to rehire the same trained and experienced personnel.

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bumped into a less senior employee's position in Sterling. The displaced Sterling employee had the right to bump another less senior employee back in Cañon City. In another case, there was a string of no fewer than five bumps which resulted from the elimination of single position.

[54] The bumping concept does have its roots in the narrow context of Article XII, § 15 of the Constitution which provides that in a layoff non-veterans must be separated before veterans (other than military retirees) with equal or greater time of service, counting military and state service.

[55] This approach has the additional advantage of enabling employees working on such multi-year projects or programs to be eligible for medical and other benefits which are not available to temporary employees, which was a concern raised at several public meetings.

Therefore, the Commission recommends extending temporary appointments from the current six months to nine months out of any twelve. This would permit the rehiring of a temporary employee after three months, rather than current requirement of a six-month gap in employment. While the problem with the six-month limit was widely recognized by both managers and employees, and an extension of the temporary appointment limit to twelve months appears to have substantial support from the state workforce, the Commission is not convinced that extending temporary appointments to 12 or 24 months (as had been proposed by the working group) would not lead to an undercutting of the merit system. Allowing unlimited annual reappointments of employees for periods of years would amount to the indefinite and unlimited appointment of persons who had not been subjected to the formal selection process. Not permitting reappointments would destroy the demonstrated need for recurring seasonal employees discussed above. Therefore, on balance, the combination of bumping reform and allowing temporary appointments for nine of any twelve months best provides the necessary flexibility, while better protecting and strengthening the merit principle.

Discipline. The current constitutional language describes four types of misdeeds for which a certified employee may be dismissed, suspended, or otherwise disciplined: "upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude."[56] The Constitution should simply provide that certified employees may be disciplined or dismissed for cause, as provided by law, and the accompanying statute should include a non-exclusive list of bases such as

[56] Colo. Const. art. XII, § 13(8).

inefficiency, poor performance, misconduct, insubordination, and conviction of a felony.

The working group had recommended eliminating the progressive discipline requirement, but the Commission heard from both employees and managers who have argued forcefully that it is a protection against arbitrary action. In addition, it makes managers properly document performance problems, which is essential in today's litigious environment in any case. Therefore, the Commission is not recommending any change to the current progressive discipline requirement.

Some state managers have complained that the current system of Board review of disciplinary actions makes it difficult or impossible to take action against a poor employee. In some cases, the agency has proved that the employee was a poor performer or engaged in misconduct, but the manager's decision was overturned because of some procedural error. When such employees must be reinstated with full back pay and benefits, it has a destructive effect on morale in the workplace. Some managers are also deterred from taking disciplinary action for fear of being reversed on a technicality.

This arises from the current legal standard that the courts have developed for civil service matters: whether the manager's action was "arbitrary, capricious, or contrary to rule or law." While this term can mean various things depending on the context,[57] in state personnel cases it means any one of the following:

57 *See Schauer v. Smeltzer*, 488 P.2d 899 (Colo. 1971)(motivated by personal notion or whim, rather than a reasonable or rational basis); *Matter of Estate of Damon*, 915 P.2d 1301 (Colo. 1996)(an abuse of discretion); *Sundheim v. Board of County Comm'rs*, 904 P.2d 1337 (Colo. App. 1995)(no articulated basis for the decision bears any rational relationship to a legitimate

- The manager failed to use reasonable diligence and care to gather relevant evidence; or
- The manager failed to give candid and honest consideration of the evidence; or
- The manager's action is based on conclusions that a reasonable person could not fairly and honestly reach.[58]

It is the first of these standards which causes the most problems and leads to the most incongruous results. If a manager undertakes an incomplete investigation, the employee may have to be rehired, even though after a full hearing it was proven that there was a good reason for termination. This serves no public purpose and in fact undercuts the merit principle. Once an agency has shown misconduct or poor performance, the employee should have to prove, by clear and convincing evidence, that the manager's action lacked any rational basis.

This approach would eliminate cases where an ALJ or the Board had a difference of opinion over the appropriateness of the action taken by the manager, unless that action was so extreme as to be irrational, while maintaining the same protections that employees have under the current law.[59] Therefore, the

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governmental interest); *Eckley v. Colorado Real Estate Comm'n*, 752 P.2d 68 (Colo. 1998)(unsupported by any competent evidence).

[58] *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001)(*quoting Van deVegt v. Board of County Commissioners,* 98 Colo. 161, 55 P.2d 703, 705 (Colo. 1936)). *Lawley* overruled *Hughes v. Department of Higher Education*, 934 P.2d 891 (Colo. App. 1997), which had held that "arbitrary and capricious" meant "without a rational basis."

[59] If the manager acts without sufficient investigation, so that the decision is unsupported by evidence, then the decision had no rational basis and should be reversed. If the manager fails to

Commission recommends a statutory revision requiring a manager's decision to be upheld unless the employee proves that the decision was irrational.[60]

Veteran's preference. The Commission encountered very little opposition to providing a preference to veterans, although state employees are divided as to how it should be applied in practice. The Commission also recognized, after receiving significant input following the working group report, that it had neither the time nor the expertise to tackle the complex problem of designing an "ideal" veteran's preference system, entailing as it does the interplay of state and federal (including military) law.[61] This sort of extensive detail is better provided by legislative bodies than by Constitutions, and the Commission urges the General Assembly and veteran's groups to consider an effort to thoroughly revamp the State's preference policy.

Because there was little perception that the preference in any sense detracted from the effectiveness of the state workforce, the Commission determined at an early stage that any change to the preference would be considered only to the extent necessary to effectuate other proposals for reform. Chief amongst these involves the move from a "rule of three" to a "rule of qualified." The current point

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give proper consideration to the evidence, the result again will be that the decision had no rational basis and should be reversed. If the manager reaches a decision that no reasonable person would have reached based upon the evidence, that decision will have no rational basis and should be reversed.

[60] Essentially, the recommendation is to reinstate, by statute, the standard used in *Hughes v. Department of Higher Education.*

[61] For example, it would be necessary to evaluate the wide variety in the character and degree of military service (active, inactive, retired, reservist, combat, non-combat, etc.), as well as determine the appropriate tailoring of the wide variety of potential preference policies (points, percentages, mandatory interview or hiring, additional preferences for disabled veterans or surviving spouses).

system is directly related to the "rule of three," and so must be modified in some minor fashion to ensure that the preference will continue to have vitality if competitive testing and ranking are eliminated. The working group proposed requiring that all qualified veterans receive interviews, but in some agencies – most notably those in the public safety arena – the Commission received feedback that this would not be an appreciable preference, and would be difficult to carry out, given the high numbers of veterans in typical applicant pools.

Therefore, the Commission recommends that the constitutional references to "points" be changed to "percentage points," and "competitive examination" be changed to "competitive examination or other comparative evaluation of applicants," which would permit the preference to be fully effective when a process other than a scored testing instrument is used in selecting eligible candidates.[62] In addition, no changes should be made to the current retention preference, which provides that qualified veterans may be laid off only after non-veterans with the same or less time of service have been laid off.[63] Finally, to help ensure more effective enforcement, the Commission further recommends that the Department of Personnel & Administration provide an administrative review

[62] The percentage approach actually strengthens the current preference because any preference expressed in points could be subverted by increasing the total available points from the customary 100 to some larger number.

[63] "[E]mployees not eligible for added points … shall be separated before those so entitled who have the same or more service in the employment of the state or such political subdivision, counting both military service for which such points are added and such employment with the state or such political subdivision, as the case may be, from which the employee is to be separated. … In the case of such a person eligible for added points who has completed twenty or more years of active military service, no military service shall be counted in determining length of service in respect to such retention rights. In the case of such a person who has completed less than twenty years of such military service, no more than ten years of service … shall be counted in determining such length of service for such retention rights." Colo. Const. art. XII, § 15(3).

process for veterans who believe they may have been denied the benefit of the preference.

Contracting. The State has always contracted with private vendors to furnish goods or services not provided by state employees, whether it be something as mundane as office supplies, or as major as highway and prison construction projects. "Privatization can provide important benefits by reducing costs and increasing governmental efficiency and productivity."[64] Importantly, however, the Civil Service Amendment makes no mention whatsoever of contracting: when it can be done, when it can't be done, how it should be done.[65] Although the Executive Branch and the General Assembly have attempted from time to time to provide direction, these questions have been resolved, in large part, by the courts.

The General Assembly enacted § 24-50-128, CRS in 1963, introducing the concept of outsourcing through the use of personal services contracts. Between 1963 and 1979, the State Personnel Director approved only approximately 300 contracts per year, and very little change occurred to the original law. In 1979, § 24-50-128(2) and (3) C.R.S. were added to provide additional guidance to agencies using personal services contracts.[66]

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[64] *Colorado Ass'n of Public Employees v. Department of Highways*, 809 P.2d 988, 994 (Colo. 1991)(citing Note, *Civil Service Restrictions on Contracting Out by State Agencies*, 55 Wash. L. Rev. 419, 424-26 (1980)).

[65] The Civil Service Amendment "does not further specify the services that must be performed by state employees and offers no guidance concerning criteria or mechanisms for delineating, enlarging or reducing the personnel system." *Department of Highways*, 809 P.2d at 992.

[66] Subsection (2) required the State Personnel Director to review contracts that were for more than six months in duration. Subsection (3) restricted the use of contracts that created employer-employee relationships to provide services "commonly or historically performed by employees in regular positions in the state personnel system."

In 1991, the Supreme Court issued a ruling which has hampered efforts to use contracts notwithstanding the business case.[67] The Department of Highways had attempted to contract for custodial, maintenance, and utility services, with the result that 35 positions were eliminated and employees laid off. In concluding that the contracts were impermissible, the court discussed two related – but separate – issues: the elimination of *positions* from the civil service, and the separation of individual *employees* from the civil service.[68] The court did not make a clear distinction, leading to no small amount of confusion and disagreement regarding the overall effect of the decision.[69]

The court also picked up on the language of the 1979 statutory addition which disapproved outsourcing services that had been "commonly or historically" performed by employees in regular positions in the state personnel system. In the case of the highway employees, the court had no problem invalidating the contracts on this basis. In 1993, the General Assembly passed a comprehensive law designed to sustain the contracting then being done by the State, which included a repeal of the "commonly or historically" provision of the 1979 law.

In 2000, the Supreme Court ruled that the reallocation of classified juvenile institution teaching positions from the Department of Human Services to exempt

[67] *Department of Highways, supra.*

[68] *Compare*, for example, the *Department of Highways* decision at page 992 (The Civil Service Amendment "does not further specify the services that must be performed by state employees and offers no guidance concerning criteria or mechanisms for delineating, enlarging or reducing the personnel system.") *with* page 998 ("contracts with private sector providers could result in the elimination of a large number of state personnel positions, and thereby implicate the concerns underlying the Civil Service Amendment.")

[69] "This would result in the termination of state employees and elimination of classified positions. This contraction of the state personnel system would implicate the tenure protection features of the Civil Service Amendment." *Department of Highways*, 809 P.2d at 992-93

Metropolitan State College positions, while preserving the civil service rights of individual employees, was constitutional.[70] Although the court recognized that the case did not involve privatization, it explained that this was at least in part because teachers at the college are protected by a tenure system and thus not subject to the "dangers" of private employment.[71] The described these dangers as being "left without the protections of the merit system," such as "competitive tests of competence, protections from arbitrary and oppressive treatment, and due process procedures before disciplinary action or termination."[72] As in *Department of Highways,* the court was somewhat ambiguous regarding whether this concern was for current state *employees,* for *positions*. Consequently, there has continued to be a cloud over state contracts for services which are currently being performed by state employees.

Of course, whether state employees are currently, or have "commonly and historically," provided a service is not an effective measure for determining what should and should not be outsourced. Just because something has always been done by state employees doesn't tell us whether it is a good idea to continue doing so. Similarly, the fact that state employees have *never* performed a function doesn't tell us that they shouldn't. It is the wrong question to be asking, and so prevents us from getting to the right answer. It provides no additional protection for state employees, and at the same time denies the flexibility needed to meet rapidly changing business needs, particularly with regards to technology.[73] While

[70] *Department of Human Services v. May*, 1 P.3d 159, 166 (Colo. 2000)
[71] *Id.* at 167.
[72] *Id.*
[73] It is also not as easy to apply as it may appear at first blush. For example, in institutions of higher education, the practice of managing campus bookstores has varied widely. Some institutions have used state employees, some have used private vendors, and still others have

state employees both "commonly and historically" and currently do provide payroll services, does this mean it continues to make sound business sense? Citizens today legitimately expect that their government will continually look for ways to improve the way it does business, and to explain that efficiencies are not realized because "we have always done it this way" is not a satisfying answer.

Instead, the State needs to be able, in the first instance, to determine what are its core functions that need to be performed by state employees, and what functions are appropriate to outsource.[74] Moreover, what is a "core function" is not locked in time; rather, it changes as the business and business conditions change. Determining what a "core function" of state government is often treads on policy decisions; the public has certain expectations of what services the government should and should not provide. The public cares less whether state employees perform payroll functions or printing services than whether these functions are performed as cost-effectively as possible.

Secondly, before proceeding to outsource non-core functions, a series of factors must be evaluated:

- The availability of the service in the market;

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used students. In such a case the "commonly and historically" test provides no clear answer. And, does the fact that the State has previously employed COBOL programmers mean that it is forbidden from contracting out programming for new, cutting-edge software?

[74] Determining what a core function is varies from organization to organization. Printing services, for example, is the likely core business function for a company such as Kinko's, but a company like Canon, which manufactures printers, may outsource its printing needs. Even a successful company such as IBM has moved toward outsourcing its transactional human resources functions. Although it is well-equipped to build and implement a human resource information system, IBM determined that it was not a "core function" of their business.

- The potential cost savings;
- The assurance that the contracted services will be of the same or greater quality as those provided by state employees;
- The extent to which performance results can be specified;
- The risks involved and the extent to which they can be minimized;
- The consequences of any service interruption due to contractor failure; and
- How accountability can be maintained by the government.

We stress that outsourcing must be closely linked to the creation of an effective performance contracting infrastructure and cost accounting expertise. Although the State currently uses best value bidding and performance-based contracting, in most respects, it does not adequately train employees to perform contract or project management. Frequently, contract administration involves payment of invoices, and minimal evaluations to determine if the contractor is performing at the expected level.

As employees' roles change from delivering the service to overseeing the service, they need the tools to perform their newly defined roles. State employees need to be protected from adverse effects on pay, tenure, and status directly resulting from outsourcing. The State should also provide retraining and education that enable employees to make successful transitions.

For this reason, contracting reforms should be phased in over time. Moreover, not only is it questionable whether the State could lay off dozens of employees and replace them with private contractors, it may be questionable policy

in any event to do so.[75] The Commission recommends that the Civil Service Amendment be modified to specifically authorize contracting, regardless of whether a state employee has ever performed the function. At the same time, explicit provision should be made to prevent any resulting direct adverse effects upon individual certified state employees. We further recommend leaving the current statutory contracting scheme – imperfect as it is – in place until the General Assembly develops clear standards regarding what sort of functions may and may not be outsourced. In addition, outsourcing efforts must be closely linked to the formation of performance-based management with the systems and cost accounting expertise that allow for competitive strategic management. Done properly, contracting has proven to be a valuable tool for state government in delivering more cost-efficient and effective services to the public.

Higher Education. Colorado is the only state that constitutionally mandates employees of higher education to be included in the general state personnel system. This relationship needs to be revisited in light of two trends that have gained momentum in recent years: decentralization and separation from the State.

First, the structure of public higher education in Colorado has devolved over the past decade. There are now eleven separate governing boards, eight of which are responsible for single-campus institutions:

- Board of Regents of the University of Colorado (four campuses)

[75] *See* Jonathan Walters, "Civil Service Tsunami," *Governing* (May 2003).

- Board of Governors of the Colorado State University System (two campuses)
- State Board of Community Colleges (sixteen campuses/thirteen institutions)
- The Trustees of the University of Northern Colorado (single campus)
- The Trustees of the Colorado School of Mines (single campus)
- The Trustees of Metropolitan State College of Denver (single campus)
- The Trustees of the Fort Lewis College (single campus)
- The Trustees of Mesa State College (single campus)
- The Trustees of Western State College (single campus)
- The Trustees of Adams State College (single campus)
- The Auraria Higher Education Center Board of Directors (single campus)

Second, the financial and oversight relationship of institutions of higher education to the rest of state government have become more attenuated. As one college president told the Commission, with the changing landscape of higher education, particularly with the advent of the "enterprise" model, the question arises regarding why and to what extent institutions should continue to be tied to the State in purchasing, capital development, and human resources.[76] It is a fair question, given the costs that are imposed upon institutions already struggling to implement multiple personnel systems.[77] "Each system has its own set of rules and policies that must be followed. Although we were not able to quantify the cost

[76] Testimony of President Jay Helman, Western State College (June 11, 2003).

[77] For example, the University of Colorado at Denver has *nine* different kinds of employees: officers, administrators, faculty, research faculty, graduate student faculty, professional exempt staff, classified staff, students, and temporaries. Testimony of Ken Tagawa, former Human Resources Director, UCD (May 9, 2003).

of maintaining these separate systems, most human resources directors with whom we spoke believe it is more expensive to maintain multiple personnel systems than it would be to maintain fewer systems under the control of a single governing board due to issues such as increased overhead, training, and conflict resolution."[78] The State Auditor thought that once past initial startup costs, the advantages of a different approach would be significant:

> The cost of administering fewer personnel systems should be less than the current cost of administering several separate systems. In addition, the State could redirect the money it currently spends each year on the exemption process. Since the higher education personnel system appears to be moving slowly toward an exempt system, expediting this process could result in certain efficiencies. It could help eliminate disparities in position classifications (i.e., exempt versus classified) within the higher education system, as well as in the state personnel system, which would in turn help eliminate the tension and conflict that sometimes occurs between classified and exempt employees. A completely exempt system would also eliminate legal challenges and provide the higher education system with greater flexibility to meet its staffing needs.[79]

The Commission considered the possibility of establishing a statewide higher education personnel system similar to that in place in the State of Illinois. However, in light of the trends discussed above, it is clear that replacing the State's one-size-fits-all system with a higher education one-size-fits-all system would provide minimal improvement; it would confer no greater flexibility, nor give any appreciable benefit to employees.[80] Each of the eleven governing boards has

[78] *Report of the State Auditor: Higher Education Exemption Process* (Sept. 2002) at 25.
[79] *Id.* at 28.
[80] "Any system that replaces the current system must also be flexible enough to accommodate the fundamental differences between the higher education agencies and other state agencies.

unique missions and systems, as well as differing labor markets that demand more flexibility. The number of qualified applicants and the institutional needs are very different at Otero Junior College in La Junta than it is for the University of Colorado system in Boulder, Denver, and Colorado Springs. However, an outright exclusion of the higher education systems from the state personnel system would be an enormous undertaking and might not best serve the State and employees at all institutions.[81]

Therefore, the working group began discussing reform measures that would allow each institution, on a governing board basis, to "opt-out" of the state system and create its own personnel system to meet its specific and unique needs. The Commission and staff are still researching and developing the historical, legal, and factual aspect regarding the particular structure and mechanism of the opt-out proposal, but at a minimum the Commission recommends that the following components are essential parts of any "opt-out" proposal:

Those differences include geographical cultural and physical regional differences, the larger number of employees who are exempt from the State Personnel System in higher education agencies, the variety of functions performed by classified staff in higher education agencies and, most important, fundamental differences in the funding structure of higher education agencies to other state agencies." Testimony of President Robert Dolphin, Fort Lewis College (June 12, 2003).

[81] "On the other hand, exempting all higher education employees does not eliminate the public interest in having the State maintain a well-qualified workforce. Any new system in higher education must be grounded in merit principles in order to ensure the taxpayers continue receive high-quality government services." *Report of the State Auditor: Higher Education Exemption Process* (Sept. 2002) at 25.

- Affected employees should be involved in the design of any alternative system;[82]
- Due process in employee discipline must be ensured;
- Current civil service employees' rights must be guaranteed if incumbents do not wish to transition to the new system; and
- Current employees' right to continue participating in PERA must be undisturbed.[83]

The Commission believes that by adhering to these principles, the General Assembly and individual governing boards can foster improved human resource management at the various institutions of higher education.[84]

Miscellaneous. The "appointing authority" concept is useful in describing persons having authority to appoint, discipline, and compensate their employees, but need not be set forth in the Constitution. The Commission recommends simply vesting this authority in the heads of department and institutions, as subsequently structured or delegated in accordance with law. We also propose updating some of the language in the amendment, such as changing the archaic "fitness" to "qualifications," using "until retirement, resignation, or separation for cause"

[82] The Commission believes any opt-out proposal must enjoy broad support from affected employees. A clear majority of the higher education employees the Commission has heard from (either directly or through staff council representatives) have opposed the opt-out concept.

[83] Participation in PERA is established by statute and is not dependent upon the state civil service. Currently, PERA covers state employees, as well as those of local school boards and other local governments, including two public (but not state) institutions of higher education: Aims Community College and Colorado Mountain College. If employees wished to participate in alternative retirement programs, they could as provided by law, but this needs to be voluntary.

[84] The General Assembly has already provided an example in the context of the Office of the State Auditor. Section 24-50-112.5(6), C.R.S.

instead of “during efficient service or until reaching retirement age,” substituting “administrative law judges” for “hearing officers,” and providing that a State Personnel Board member has “no limitation of terms” rather than “may succeed himself.”